

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERIC EL,

No. C 06-3696 SI (pr)

Plaintiff,

ORDER

v.

Warden M.S. EVANS; et al.,

Defendants.

INTRODUCTION

Eric El, an inmate at Kern Valley State Prison, filed this pro se civil rights action under 42 U.S.C. § 1983. In his complaint, El alleges that a correctional officer used excessive force on him on September 29, 2005. His complaint is now before the court for review pursuant to 28 U.S.C. §1915A.

DISCUSSION

A federal court must engage in a preliminary screening of any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. See id. at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

1 There is an exhaustion problem in this action. "No action shall be brought with respect
2 to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined
3 in any jail, prison, or other correctional facility until such administrative remedies as are
4 available are exhausted." 42 U.S.C. § 1997e(a). The State of California provides its inmates and
5 parolees the right to appeal administratively "any departmental decision, action, condition or
6 policy perceived by those individuals as adversely affecting their welfare." See Cal. Code Regs.
7 tit. 15, § 3084.1(a). In order to exhaust available administrative remedies within this system, a
8 prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal
9 written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution head
10 or designee, and (4) third level appeal to the Director of the California Department of
11 Corrections. See id. § 3084.5; Ngo v. Woodford, 126 S. Ct. 2378, 2383 (2006); Barry v. Ratelle,
12 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). Ngo explained that the rejection of an inmate appeal
13 for a procedural defect -- even a incurable one such as untimeliness -- does not exhaust
14 administrative remedies.

15 Nonexhaustion under § 1997e(a) is usually an affirmative defense, but a complaint may
16 be dismissed by the court for failure to exhaust if a prisoner "conce[des] to nonexhaustion" and
17 "no exception to exhaustion applies." Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).

18 The complaint and attachment to it appear to show that El did not exhaust administrative
19 remedies. He alleges in his complaint that he exhausted because the "institution refused to
20 accept appeal." Complaint, p. 2. The inmate appeal materials attached to the complaint appear
21 to clarify the situation, showing that the inmate appeal was returned to El with an
22 "inmate/parolee appeal screening form" on which it was stated that the inmate appeal form was
23 rejected because it was "not completed properly" and "the appeal is not timely." The inmate
24 appeal had been submitted two months after the incident occurred; i.e., the incident occurred on
25 September 29, El wrote the appeal on November 30, and prison staff rejected it on December
26 6, 2005. The screening form stated: "This screening action may not be appealed. If you allege
27 the above reason is inaccurate, then attach an explanation on a separate piece of paper, or use
28 the back of this screen out -- do not write any more on the appeal itself. Please return this form

1 to the Appeals Coordinator with the necessary information attached." There are no documents
2 attached to the complaint that suggest El pursued the matter further.

3 The rejection of the appeal as untimely means that El has not exhausted his administrative
4 remedies and apparently cannot do so. The recent decision in Ngo appears to bar this action.
5 In Ngo, the Supreme Court determined that an inmate had not exhausted his administrative
6 remedies when his inmate appeal was rejected as untimely. It therefore appears that this action
7 should be dismissed with prejudice under the rationale of Ngo because El did not exhaust his
8 administrative remedies before filing it. Before deciding that dismissal is appropriate, the court
9 will give El an opportunity to explain why this action should not be dismissed. For example, he
10 might be able to show that the preceding paragraph does not correctly state the facts in his case,
11 or that he filed another appeal that was able to be pursued all the way to the Director's Level.

12 13 CONCLUSION

14 For the foregoing reasons, El may file no later than **September 22, 2006**, an explanation
15 or argument as to why the action should not be dismissed with prejudice for failure to exhaust
16 administrative remedies before filing this action.

17 IT IS SO ORDERED.

18 Dated: August 16, 2006

19 
SUSAN ILLSTON
United States District Judge